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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	05 Civ. 5468 (JSR)
Plaintiff,	**ECF Case**
v.	SECOND SUPPLEMENTAL DECLARATION OF KAREN L. HECKER
DEPARTMENT OF DEFENSE,	
Defendant.	

Pursuant to 28 U.S.C. §1746, I, Karen L. Hecker, declare as follows:

1. I am an Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense (DoD). In that capacity, I am responsible for, among other things, overseeing litigation involving the DoD. I am familiar with Plaintiff's January 18, 2005 Freedom of Information Act (FOIA) request that is a subject of this action, and with the documents produced by DoD in response to that request. Unless otherwise indicated, the statements in this declaration are based upon my personal knowledge.

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Processing of the Associated Press' FOIA Request

2. The Associated Press (AP) filed a Freedom of Information Act request asking for, among other things, "details and explanations of the decisions made to release or transfer detainees [from Guantanamo], including the reason why the decision was made." DoD's original search and production of documents in response to that request involved only documents created as part of the Administrative Review Board (ARB) process that was instituted by DoD in June 2004.

3. DoD subsequently agreed to expand its search beyond the ARB process and to construe AP's request as a request for information regarding the detainees who left Guantanamo through the review process that existed before the creation of the ARBs. DoD agreed to process a sample pre-ARB review process document to provide an example of the type of paperwork that documented the Deputy Secretary of Defense's decision to release or transfer detainees from Guantanamo prior to the creation of the ARB process, and the withholdings that DoD intended to assert regarding the information in those documents.[1]

4. Prior to the institution of the ARB process, DoD assessed Guantanamo detainees for potential release or transfer through an interagency process managed by the Office of Detainee Affairs (DA). The decision about whether to transfer or release the detainees was made by the Deputy Secretary of Defense (DEPSECDEF). The Office of Detainee Affairs was responsible for drafting a decision memorandum to present to the DEPSECDEF regarding the detainees being considered for transfer or release. For each detainee being considered in this process, the DEPSECDEF would be provided with assessment and recommendation memoranda from United

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[1] While the sample documents are generally representative of this category of documents, other documents may contain additional or unique information that may be exempt from disclosure for different or additional reasons, and thus DoD reserves the right to claim further exemptions as to other documents in this group.

States Southern Command (USSOUTHCOM) and the Criminal Investigative Task Force (CITF), respectively, and (in most cases) a worksheet created by the Office of Detainee Affairs that summarized information from both memoranda as well as other information about the detainee.

5. To accomplish the purpose discussed in paragraph 3 above, I selected a set of documents that were illustrative of the documents described in paragraph 4. The documents included a July 6, 2004, decision memorandum signed by the DEPSECDEF on July 14, 2004; an undated Detainee Affairs worksheet for the same detainee; a February 3, 2004, assessment and recommendation memorandum prepared by CITF regarding one of the detainees referenced in the decision memorandum; and an October 20, 2003, assessment and recommendation memorandum prepared by USSOUTHCOM regarding the same detainee.

6. I forwarded to the Office of Detainee Affairs for review the action memorandum and the worksheet it had created as part of the package presented to the DEPSECDEF.

a. Following its review of the action memorandum, the Office of Detainee Affairs withheld certain information from release, citing FOIA Exemptions (b)(1) and (b)(5). The releasable version of the action memorandum is attached to this Declaration as Exhibit 1. A declaration supporting the withholdings from this document has been provided by the Office of Detainee Affairs. *See* Declaration of Charles D. Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs.

b. The Office of Detainee Affairs referred the detainee worksheet to CITF and JTF-GTMO for those organizations to review the CITF- and JTF-GTMO-originated information contained in the worksheet. The releasable version of this document is attached to this Declaration as Exhibit 2. Declarations from CITF, JTF-GTMO and the Office of Detainee Affairs support the withholdings taken in this document. (The detainee worksheet also contains a photograph of the detainee, which was withheld under FOIA Exemption (b)(1). The propriety of DoD's classification of detainee photographs is pending before this Court in *AP v. DOD*, 06 Civ. 1939 (JSR), and DOD adopts and incorporates its submissions in that case to the extent they relate to the withholding of detainee photographs.)

7. I forwarded the documents containing CITF-originated information to that organization for review. CITF reviewed its assessment and recommendation memorandum and the detainee worksheet prepared by the Office of Detainee Affairs.

a. CITF determined that its assessment and recommendation memorandum contained certain classified information derived from the intelligence-gathering operation of JTF-GTMO, as well as other information created by JTF-GTMO. Because this JTF-GTMO information was extracted, summarized and utilized by CITF in its assessment memorandum, CITF was required to and did refer these parts of its memorandum to JTF-GTMO for review and potential release under FOIA.

b. CITF also reviewed the detainee worksheet referred to it by the Office of Detainee Affairs, as well as the CITF-originated information in its own assessment and recommendation memorandum. Following that review, CITF determined that certain CITF-generated information in its assessment and recommendation memorandum and the detainee worksheet must be withheld from release under FOIA Exemptions (b)(1), (b)(2) and (b)(5). The releasable version of the CITF assessment and recommendation memorandum is attached to this Declaration as Exhibit 3. A declaration supporting the withholdings in this document has been provided by the Commander, CITF. *See* Declaration of Colonel David A. Smith.

8. I forwarded the documents containing JTF-GTMO-originated information to that organization for review.

a. In addition to reviewing the JTF-GTMO-generated information found in the CITF memorandum referenced in paragraph 7a above, JTF-GTMO also reviewed the USSOUTHCOM assessment and recommendation memorandum, and the detainee worksheet prepared by the Office of Detainee Affairs.

b. Following that review, JTF-GTMO withheld certain information from the USSOUTHCOM assessment and recommendation, the CITF assessment memorandum, and the detainee worksheet, citing FOIA Exemptions (b)(1), (b)(2) and (b)(5).[2] The releasable version of the USSOUTHCOM assessment and recommendation memorandum is attached to this Declaration as Exhibit 4. A declaration supporting the withholdings from this document has been provided by the Commander, JTF-GTMO. *See* Declaration of Rear Admiral Harry B. Harris, Jr.

9. A classified declaration provided by the Under Secretary of Defense for Intelligence further supports DOD's withholdings in this case pursuant to Exemption (b)(1).

Withholding of Detainee Identifying Information From the Pre-ARB Review Process Documents Under Exemption (b)(6)

10. In addition to the withholdings described above, DoD has withheld detainee identifying information from the sample action memorandum, the USSOUTHCOM and CITF assessment and recommendation memoranda and detainee worksheet. The information withheld from these sample documents pursuant to Exemption 6 can be identified as applying to specific detainees, all of whom were determined to be enemy combatants. Some of the information withheld from the USSOUTHCOM assessment and recommendation memorandum and the worksheet under Exemption (b)(6) also constitutes medical information.

[2] DoD notes that while this sample document is generally representative of this category of documents, other documents may contain additional or unique information that may be exempt from disclosure for different or additional reasons, and thus DoD reserves the right to claim further exemptions as to other documents in this group.

11. Disclosure of the information withheld from these four documents under Exemption (b)(6) could reasonably be expected to subject these enemy combatants and their family members to public scrutiny and curiosity and expose them to embarrassment and unwanted attention. In addition, DOD has serious concern that release of the enemy combatants' identifying information, in conjunction with background information providing details of their involvement in the Global War on Terrorism, could place them and their family members at substantial risk of harassment and even physical harm, including from individuals who believe that the detainees may have cooperated with interrogators at Guantanamo. This concern is heightened by the release of identifying information in the context of documents contemplating the detainees' transfer or release from Guantanamo.

12. A substantial majority of the detainees who departed from Guantanamo as a result of the pre-ARB review process did not participate in a Combatant Status Review Tribunal (CSRT). The identifying information of enemy combatants who departed from Guantanamo as a result of the pre-ARB review process and who did go through a CSRT is being withheld for the same reasons that DOD is withholding identifying information for detainees who have departed Guantanamo after going through the ARB process. See Declaration of Karen L. Hecker dated February 22, 2006 ("First Hecker Decl.") ¶ 16d. The propriety of this withholding is before the Court in the pending motion for summary judgment in this case.

Withholding of Detainee Identifying Information From the Pre-ARB Review Process Documents Under Exemption (b)(5)

13. In addition to the withholdings described above, DOD is withholding from the pre-ARB review process documents under FOIA Exemption 5 the identifying information of approximately 12 detainees whom the Deputy Secretary of Defense determined through the pre-ARB process can be transferred or released, but who have not yet departed Guantanamo because

appropriate transfer assurances have not been obtained from the receiving governments. *See* First Hecker Declaration ¶¶ 3, 16a-c. The propriety of this withholding is also before the Court in the pending motion for summary judgment in this case.

Withholding of Information Regarding Detainees Determined to No Longer Be Enemy Combatants

14. To date and as detailed below, 67 detainees at Guantanamo have been determined to no longer meet the definition of "enemy combatant," based on a review of the information currently available to DoD at the time of that decision. These detainees did not participate in the ARB process.

15. In March 2004, 29 detainees were determined to no longer meet the definition of "enemy combatant," based on a review of the information currently available to DoD at that time. All of these detainees have since left Guantanamo.

a. I selected a memorandum that was illustrative of the documents created in March 2004, when these 29 detainees were determined to no longer meet the definition of "enemy combatant."

b. I forwarded the sample document to JTF-GTMO for review and processing under FOIA. JTF-GTMO reviewed the document and withheld certain information under Exemptions (b)(1) and (b)(2), as explained in the Declaration of Admiral Harris. The releasable version of this document is attached to this Declaration as Exhibit 5.

16. I also collected the "Unclassified Summary of Basis for Tribunal Decision" documents for 38 detainees who were determined by their Combatant Status Review Tribunals (CSRTs) to no longer meet the definition of "enemy combatant."

a. These documents are being processed under FOIA and will be produced to AP with only the names of DoD personnel removed pursuant to FOIA Exemption (b)(6).[3] It is my understanding that AP is not challenging these withholdings.

b. Of this group of 38 detainees, all but three have since left Guantanamo. The United States government has been actively engaged in efforts to locate and arrange for a suitable country to accept the remaining three detainees and intends to release them as soon as suitable countries for release can be found.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of August, 2006.

Karen L. Hecker

[3] The CSRTs for these detainees also produced a "Classified Summary of Basis for Tribunal Decision," in which the CSRT lists and discusses the classified evidence presented to the CSRT. The withholdings in these documents would be similar to those taken in the sample March 2004 document referred to in paragraph 15, and explained in paragraph 30 of the Declaration of Admiral Harris.